No. 89-1715

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

CATHY BURNS
Petitioner,

vs.

RICK REED
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED MAY 7, 1990
CERTIORARI GRANTED JUNE 28, 1990

QUESTIONS PRESENTED

I. Is a deputy prosecutor entitled to absolute immunity when he gives approval to conduct which is known or should be known to him to be improper, namely, the authorizing of the use of hypnosis on a suspect?

II. Is a deputy prosecutor entitled to absolute immunity when he seeks a search warrant in a probable cause hearing and intentionally fails to fully inform the court that the arrested person made an alleged confession while under hypnosis and yet had persistently denied committing any crime before and after the hypnosis?

III. Is a deputy prosecutor entitled to absolute immunity when he participates in the unlawful arrest of an individual when under state law the prosecutor possesses the same arrest powers as police officers?

IV. Are such activities individually and collectively outside the protected activities of initiating a prosecution and presenting the state's case?

V. Is it a question of fact for the jury to decide whether an activity is investigative when the veracity of the witnesses and the conflict in the testimony do not define the issue of immunity purely as a matter of law?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Cathy Burns[1] and the Respondent Rick Reed[2], Deputy Prosecutor for Delaware County, Indiana.

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[1]Ms. Burns changed her surname from Sells to Burns when she married.
[2]Rick Reed was sued individually and in his official capacity.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 894 F.2d 949 and is reprinted in the appendix to the Petition for Writ of Certiorari, p. 1a.

The decision of the United States District Court for the Southern District of Indiana (Dillin, D.J.) has not been reported. It has been transcribed and reprinted in the appendix to the Petition for Writ of Certiorari, p. 15a.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Southern District of Indiana. Petitioner proceeded to trial and on November 4, 1988, the Southern District granted respondent's motion for a directed verdict.

On petitioner's appeal, the Seventh Circuit affirmed the district court's order directing a verdict in favor of the respondent on February 6, 1990. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of 42 U.S.C. § 1983 and Indiana Code provisions 33-14-1- 3 (1971), 35-33-1-1 (1971) and 35-41-1-17 (1971) are reproduced verbatim in the Petition For a Writ of Certiorari, Appendix, p. 19a.

STATEMENT OF THE CASE

This case was initiated by Cathy Burns on January 31, 1985, by the filing of a complaint in the United States District Court, Southern District of Indiana, against Rick Reed, the Deputy Prosecutor, Delaware County, Indiana.[3] Burns sought actual and punitive damages against Reed for violation of her constitutional rights while acting under color of state law. Victimized by the wrongful investigatory conduct of Reed in collusion with the police officers, Cathy Burns' only redress is through the enforcement of her rights by the provisions of 42 U.S.C. § 1983. The District Court had jurisdiction over the case

[3]The original complaint named ten Defendants. The claims against Defendants Muncie Police Department and several other individuals were dismissed by the Trial Court. The case continued against Defendants Scroggins, Cox and Stonebraker, investigating officers in the Muncie Police Department, and Rick Reed, a Deputy Prosecutor for Delaware County, Indiana. Scroggins, Cox and Stonebraker settled with Burns for sums of money totalling $250,001.00. The case against Reed continued to trial.

pursuant to the provisions of 28 U.S.C. § 1343(a) 3 and 4, as the suit was brought under 42 U.S.C. § 1983 to redress the deprivation of Burns' constitutional rights.

On the evening of September 2, 1982, an unknown person entered the home of Cathy Burns, Petitioner. The intruder shot her two sons, Eddie Griffin and Denny Sells, and attacked her with a blunt instrument (R. 157-58). Cathy Burns, a reserve police officer working as a civilian radio dispatcher for the Muncie Police Department, managed to fire one shot from her service revolver before the intruder overpowered her, knocking her unconscious (R. 158-59). She was awakened by one of her children and after assessing the injuries to both of them, called the police dispatcher in a hysterical state (R. 42). A message, "I took what you loved most," was scrawled on a mirror with lipstick (Pl. Exhibit 88). All three received medical treatment. Eddie Griffin underwent surgery at Methodist Hospital in Indianapolis, Indiana and Denny Sells was hospitalized at Ball Memorial Hospital in Muncie, Indiana.

After a period of time, Muncie Police Officers, Cox and Scroggins formed the opinion that Cathy Burns was a prime suspect in the shooting (R. 75). Although there was no admissible or reliable evidence to establish probable cause (R. 23-24; 110-111), the officers remained focused on Cathy Burns. They questioned her on numerous occasions but she repeatedly denied shooting her sons. The officers asked Cathy Burns to submit to a polygraph examination and she did so (R. 23). The examination results supported her claim of innocence.[4] Cathy Burns also submitted to numerous handwriting examples and they also were exculpatory.[5] On the morning of September 21, 1982, the officers asked Burns to submit to a voice stress test which again produced negative results. They continued their interrogation throughout the day of September 21, 1982 (R. 81, 103-105), and denied her the opportunity for any food, causing her to become so lightheaded that she fainted while at the detective's office (R. 166). This dizziness and the fact that she vomited in the restroom did not deter Officers Cox and Scroggins from pursuing their theory and persuading her to submit to questioning under hypnosis (R. 168-169). Reed was contacted at home before Burns

[4]Testimony of State Trooper Coffin, the polygraph examiner, is not part of the record on review, (Pet. App. 2a).

[5](Pet. App. 2a)

was placed under hypnosis. Reed approved and authorized the hypnosis despite being warned by Officer Scroggins that Cox was trained not to examine suspects under hypnosis. Reed recalled no such conversation and testified only that he was contacted at home sometime after 5:00 P.M. (R. 36, 101-102). Officer Cox, now having permission, placed Burns in a hypnotic state and videotaped the questioning.[6] Cox, with Scroggins in the room, continued the interrogation of Cathy while she was hypnotized and on numerous occasions challenged her truthfulness and placed her under a deeper and deeper trance.[7] While under hypnosis, Cathy made statements which Cox and Scroggins interpreted as evidencing a multiple personality. The videotape of the hypnosis also shows that there was an unscrupulous post-hypnotic suggestion made by Cox that *she would not remember the hypnosis and would cooperate fully with their investigation of the crime* (Pl. Exhibit 112). Reed came down to the detective's office that same evening but does not recall viewing the video, contrary to the officers' testimony (R. 63, 127). Cox was emphatic in his testimony that Reed viewed the video (R. 107). Officers Cox and Scroggins and Deputy Prosecutor Reed discussed the video hypnosis of Burns and the officers specifically requested Reed's advice or permission as to whether or not to make a warrantless arrest of Cathy Burns (R. 107-108). Cox added that he probably would not have arrested Burns if Reed had indicated otherwise (R. 116). Reed, Scroggins and Cox decided to arrest Burns (R. 114-16).

Officer Cox had a meeting with Reed and Scroggins in which it was decided that they would not reveal to the public that Cathy Burns had been hypnotized or what their source of information was regarding various matters of evidence (R. 109).

The following day, Officer Scroggins and Chief Deputy Prosecutor Reed sought a search warrant from the Honorable Judge Betty Cole (R. 4-11, 45-47). At the hearing for the search warrant Reed told the Judge of Burns' "confession," but he did not tell her it was obtained while Burns was under hypnosis (R. 47-49). The Judge also was not told of the two stated claims of

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[6]The Seventh Circuit's opinion incorrectly states that Burns was hypnotized with the assistance of an employee at a local supermarket chain (Pet. App. 3a) (See R. 24).

[7]See Dr. Elgan Baker's video deposition for analysis of procedure and instructional film.

innocence by Cathy Burns. Judge Cole issued the search warrant totally ignorant of the basis of the information presented by Reed (R. 11-12).[8] It was not necessary or required that Reed or any prosecutor be present for a hearing on probable cause to seek a search warrant (R. 15-16).

Cathy's children were removed from her custody immediately. Eight days after her arrest and six days after the search warrant was obtained, Jack L. Stonebraker, the police liaison with the Delaware County Prosecuting Attorney's Office, submitted an affidavit to Judge Cole in support of probable cause to issue an arrest warrant (Pl. Exhibit 24, R. 11-12). Again, the information presented did not inform the court that the interrogation of Cathy Burns occurred while she was under hypnosis. Burns was detained in the psychiatric ward of Ball Memorial Hospital when the Judge issued the warrant charging her with attempted murder of her own children, and she remained in the psychiatric ward for approximately four months. During that time, Burns was observed and tested by several medical experts who concluded that she did not suffer from a multiple personality. For example, Dr. Buonanno, who was asked to examine Cathy for her mental competency to stand trial, offered the following conclusion:

> I did not find sufficient criteria to make the diagnosis of multiple personality. There are no episodes of depersonalization or abrupt changes in personality. There is no homocidal ideation or inappropriate interaction to staff and family members. She is able to handle the stress of being on a psychotic unit as well as fear of losing custody of her children and her employment with maturity.[9]

Dr. Phillip Coons of LaRue Carter Hospital in Indianapolis provided psychiatric consultation. Dr. Coons has extensive training and experience with multiple personalities (Pl. Exhibit 33). He concurred with Dr. Buonanno that Cathy did not have a multiple personality (Pl. Exhibit 37). The criminal court granted

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[8]Entire testimony found Pet. App. 19a, compare to Pl. Exhibit 24.

[9]See Pet. App. 4a.

her motion to quash the statements that she made to Officers Scroggins and Cox while under hypnosis. In the face of this development, the prosecutor's office dismissed all criminal charges against her.

Because of media attention and damaging statements made by the police and Reed, as well as remarks made by the fathers of the minor children, the civil court felt it was in the best interest of the children that they not be returned to their mother. The oldest child, Eddie, was allowed to return in 1986 (R. 185), but the younger child was not permitted by his father to live with Burns, nor was Burns permitted regular visitation until 1988 (R. 185). Following Cathy's release, she attempted to regain her employment with the Muncie Police Department but was unable to do so because of accusations made during her employment hearing and in public by various police officers and Deputy Prosecutor Reed. Reed gave a public interview indicating he still considered her the primary suspect. His public statements interfered with her ability to gain employment and continued to provide a basis for the fathers of the minor children to resist any mother-child contact.

SUMMARY OF ARGUMENT

I.

The Court of Appeals erred in according absolute immunity to the prosecutor for his actions of authorizing hypnosis of a suspect, participating in a warrantless, unlawful arrest and in seeking a search warrant based on his deceitful and unscrupulous presentation to the court. The persistent investigatory involvement of Reed occurred before formal charges were filed, thus ensuring that Cathy Burns was not protected by proper representation or the provisions of the Fourth, Fifth and Fourteenth Amendments.

Cathy Burns seeks reversal of the trial court's directed verdict and a declaration that Reed's investigatory conduct is not protected by absolute immunity. The Petitioner asks this Court to hold prosecutor Reed's conduct to be unlawful.

There is no persuasive public policy which specifically excuses prosecutorial misconduct that precedes the formal filing of criminal charges. The legislative history of 42 U.S.C. § 1983 and its plain language makes no exception to forgive or protect

prosecutors for unconstitutional conduct. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

A succession of important cases, *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) have imposed on the circuits the functional test as a means of balancing competing public policy concerns.

The Supreme Court has consistently found support in the common law and in its contemporary fashioning of public policy to clothe prosecutors with absolute immunity for conduct which is intimately associated with the bringing of criminal charges and presenting the state's case. But Cathy Burns was egregiously harmed by the conduct of Reed, which properly characterized was investigative and therefore, under *Imbler*, not protected by absolute immunity. Each of Reed's acts was the functional equivalent to that of a police officer conducting an investigation aimed at solving a crime. Reed's decision precluded judicial review because the arrest of Cathy was warrantless.

In her appeal from the district court, Burns was required to address the Seventh Circuit precedents which resolved the issue of conduct by definition. Burns does not accept the Seventh Circuit's definition of "advice," nor is she persuaded that "advice" is protected prosecutorial conduct embraced within the quasi-judicial limits which *Imbler* held to be totally immune.

Under Indiana Statutory Law, the prosecutor has the same arrest powers as a police officer (I.C. 35-33-1-1 and 35-41-1-17; Pet. App. 24a). Reed was as much an arresting officer of Cathy Burns as Officers Cox and Scroggins. There were no exigent circumstances that would require an immediate, warrantless arrest. If the arrest is found to be unlawful or is in violation of the constitutional rights of Burns, Reed should suffer the same risks of liability as the police officers under 42 U.S.C. § 1983, who paid a judgment of $250,001.00.

The joint decision by Reed, Cox and Scroggins not to inform the public of the source of new information (alleged confession obtained under hypnosis as revealed by a multiple personalty) was manifested the following day when Reed deliberately lied to the court so as to obtain a search warrant.

While Burns does not accept the Seventh Circuit Court of Appeals' interpretation of the functional approach enunciated in *Imbler*, she nonetheless asserts that even under its broader immunity doctrine, Reed's conduct is investigatory.

II.

The jury should resolve *all* questions of fact. While there is some conflict in the evidence, for purposes of granting a directed verdict, all reasonable inferences must be allowed to the non-moving party, and the evidence must be viewed in the light most favorable to the party opposing the motion. See *Kole v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981).

Cathy Burns was denied the right to have a jury decide whether Reed's conduct was unlawful. The trial court's characterization of his actions preempted her right under the First Amendment to petition the government for redress of grievances. The Seventh Circuit decision precludes the jury from fairly defining the conduct. If the conduct is deemed investigatory by the jury after weighing the facts, then Reed should be held liable.

ARGUMENT

Prosecutors are to be protected by absolute immunity for activities intimately associated with bringing prosecution. Only those acts which are prescribed by law to be undertaken by a prosecutor should be protected. All other activities of investigation more typically done by police are not protected by immunity. Such protection for non-judicial acts invites arrogant misuse of power as found in the warrantless arrest of Cathy and the shameful and contemptible use of forensic hypnosis which was viewed by Reed. The duplicity was brought into court by Reed, who willfully disregarded his oath of office and procured a search warrant by lying.

I.

PUBLIC POLICY CONSIDERATIONS PRECLUDE IMMUNITY FOR PROSECUTORIAL CONDUCT WHICH IS INVESTIGATIVE.

A. PROSECUTORS ARE VESTED WITH IMMUNITY FOR ACTIVITIES INTIMATELY ASSOCIATED WITH INITIATING PROSECUTION AND PRESENTING THE STATE'S CASE.

In 1976 this Court addressed the issue of prosecutorial

immunity in the case of *Imbler v. Pachtman*, 424 U.S. 409 1976). While there are some conflicts among the testimony of Burns, Reed, Cox and Scroggins, the trial court's ruling and the affirmation by the Seventh Circuit Court of Appeals emphasized the policy considerations which they found in *Imbler* and related immunity cases. Following the rationale of *Butz v. Economou*, 438 U.S. 478 (1978) *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 884 (1986); and *Henderson v. Lopez*, 790 F.2d 94 (7th Cir. 1986), the Seventh Circuit upheld the trial court's ruling which granted Reed's motion for a directed verdict at the close of Plaintiff's case.

A synthesis of the policy reasons for prosecutorial immunity is basically this: qualified immunity would impair the proper operation of the judicial system by hampering the prosecutor in his duty by (1) taking up all his time, and (2) taking away his vigor and independence; this fact, coupled with the existence of other checks on prosecutorial misconduct, outweighs the public interest in seeing that legitimate § 1983 plaintiffs recover for their constitutional injuries. Cathy Burns accepts this rationale as applied to conduct intimately associated with initiating a prosecution and presenting the state's case, but rejects this rationale as applied to a prosecutor's actions of "giving advice". Cathy Burns does not believe that prosecutors are deterred by disciplinary action or potential prosecution.

While it is laudable and should be encouraged that police seek advice before acting *without* judicial approval, it does not follow that the Fourth Amendment, requiring "that no warrant shall issue but upon probable cause," should be circumvented to the serious detriment of the constitutional rights of citizens. The prosecutor is entrusted with the administration of justice and is to protect the innocent as well as convict the guilty. See *Brady v. Maryland*, 373 U.S. 83 (1963). To this end he must remain objective and detached from investigative activity. The record in this case demonstrates that Reed was not objective and was clearly not detached.

The Constitution and the Bill of Rights in companion with 42 U.S.C. § 1983 are formidable legal weapons to vindicate wrongs suffered by Plaintiffs. The Fourth, Fifth and Fourteenth Amendments are intended to shield citizens from excesses of governmental power and overreaching police authority.

It is ironic that police associations regard many Supreme Court decisions which have imposed sanctions in the form of exclusionary rules as anathema to effective law enforcement. The Fourth Amendment protects all. The fairness of the criminal justice system should be assured by a fair reading of the Fourth Amendment and 42 U.S.C. § 1983.

The founding fathers were less than two generations removed from a Europe wrought with religious persecution, sovereign tyranny and prosecutorial fiat. There has been an evolving meaning of many terms and principles—privacy, cruel and unusual punishment, due process and sovereign immunity[10], to name a few, and they are constantly refined in response to contemporary social, political and moral questions.

The notion that power in the hands of those that govern, and particularly that aspect of governance within the criminal justice system, is carefully and particularly balanced with countervailing forces, due process, avenues of appeal and remedies both equitable and legal has been the subject of commentary from de Toqueville to Judge Learned Hand.[11]

The Western presumption of human nature and the political philosophies of Locke and Rousseau manifest themselves in the specific prohibition against governmental abuse and guarantees of individual liberty found in the Bill of Rights. The checks and balances apparatus has been called "a vast system of brokerage and accommodation." The system attempts to promote conciliation, but conciliation is frustrated when basic liberties are denied.

A survey of cases reveals that most of the circuits have interpreted *Imbler* narrowly because immunity is an exceptional protection against tort liability and should be extended no farther than necessary. The Courts of Appeals for the Second, Tenth, and District of Columbia Circuits have held that prosecutors do not enjoy absolute immunity for investigatory functions. The Second Circuit, in *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988), held that a prosecutor who applied to a court for a wiretap warrant was not engaged in a clearly prosecutorial function and therefore was not entitled to absolute immunity. Similarly, in *Barbera v. Smith*, 836

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[10]See Prosser and Keeton on Torts, sec. 131, 5th Fd. (1984); Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation § 7.13-7.14, McGraw Hill (1986).

[11]Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

F.2d 96, *cert. denied*, __ U.S. __, 109 S.Ct. 1338 (2nd Cir. 1988), the Second Circuit held that "the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution" are "of a police nature and are not entitled to absolute protection." *Id.* at 100 (emphasis supplied). The *Barbera* court distinguished these unprotected activities from "the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order" as being protected by absolute immunity. *Id.* at 100-101.

The Court of Appeals for the District of Columbia Circuit characterized the obtaining of unconstitutional search warrants and arrest warrants as investigatory in nature and therefore not protected by absolute immunity in *McSurely v. McClellan*, 697 F.2d 309, *cert. denied*, 474 U.S. 1006 (D.C.Cir. 1982). The District of Columbia Circuit, in *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974), held that prosecutorial immunity was not available when a civil rights claim "focuses on a prosecutor's actions in the course of directing police investigative activity." *Id.* at 91.

In this case, Burns contends that Reed's authorization of the use of hypnosis is an investigatory activity and therefore should not be protected by absolute immunity. Reed's actions are more akin to the supervision of law enforcement agencies in acquiring evidence which may be used in a subsequent prosecution, rather than the organization, evaluation, or marshalling of evidence that would enable the prosecutor to try a case. Public policy requires that Reed be held accountable for his misconduct.

The office of prosecutor is often regarded by many to be the most powerful office in elected county government. It is the discretionary power of the office which permits criminal charges to be brought under the statutory scheme in Indiana and in most states. To assist the prosecutors in this most difficult task, many state jurisdictions have associations or councils which provide instructional material and training seminars so these elected prosecutors and deputies may be informed of the latest rulings and policies in the criminal justice system. In the case of Cathy Burns, the prosecutor's manual was introduced as Pl. Ex. 111. It contained public policy considerations of the office. As an officer entrusted with the administration of justice, it is generally recognized that the prosecuting attorney should seek justice, and to protect the innocent as well as convict the guilty. The Indiana

Court of Appeals addressed the ethics of the office in the case of *Palmer v. State*, 288 N.E.2d 739, 755 (Ind. App. 1974):

> It is our opinion that the duty of a prosecuting attorney, when he first comes in contact in his official capacity with a criminal case, is that he must look upon the same and act toward the same with the same impartiality as a judge does throughout all preliminaries and the trial of the cause itself.
>
> It is the duty of the prosecuting attorney to represent the person charged with the crime with the same zeal and vigor that he may later use for the State in the trial of the cause, to see that the person is not erroneously charged, tried and convicted, and that all his rights and his freedom are protected. On the other hand, it is also his duty to determine if the person charged with the crime is guilty of that crime and from his investigation to determine if he should be prosecuted and if prosecuted would a conviction be proper.

The American Bar Association Code of Professional Responsibilities which was adopted on March 8, 1971, addressed the duty of the prosecuting attorney in Ethical Considerations 7-13(b):

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as the selection of cases to prosecute, (2) during trial the prosecutor is not only an advocate, but he also may make decisions normally made by an individual client and those affecting public interest

> should be fair to all, and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

In addition, Disciplinary Rule 7-103 states:

> DR 7-103: <u>Performing the Duty of Public Prosecutor or Other Governmental Lawyer</u>
>
> (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has not counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

These ethical considerations impose upon the prosecutor a duty to be forthright and fair in the execution of justice. They focuse primarily on the activities of the prosecutor after the initiation of criminal charges. The role of the prosecutor is to prosecute. His objectivity and impartiality would be seriously impaired if he became involved in investigations, interrogation of suspects and interview of witnesses. The protection in the Fourth Amendment suggests that there may be two impartial public officials involved in the initial determination of issuing a search warrant or an arrest warrant, namely: a magistrate and the prosecutor. How easy it is for the prosecutor, in his zeal to solve a heinous crime or to satisfy the public's demand for instant justice, to urge either inadvertently or perhaps even deliberately on a court the issuance of a warrant on false or dishonest pretenses. Absolute immunity should not shield a prosecutor in his investigatory activities from wrongful conduct any more than it should shield a police officer who exceeds the limited power

granted to him. Indeed, a prosecutor with powers greater than those of a police officer must be restrained from wrongful conduct.

The reality of the criminal justice system places the prosecutor and police in a daily working relationship, a symbiotic relationship, each dependent on the other to produce favorable statistics. Police departments must act efficiently and successfully in order to justify requests from the various fiscal bodies or in obtaining Law Enforcement Administration Assistance grants. So, too, prosecutors, in order to remain in office, must obtain a high conviction rate and demonstrate sternness in the sentencing phase of the trial. Where are the checks and balances to initially prohibit police and prosecutors from infringing upon the liberty interests of citizens? It is unlikely, and human nature would suggest it is improbable, that a prosecutor would criminally charge those officers for perjury or false arrests, officers upon whom he generally exclusively depends for apprehensions of suspected criminals. It is just as improbable that criminal court judges would discipline or sanction prosecutors for pre-trial misconduct. In the criminal justice system there is no rule analogous to Rule 11 of the Federal Rules of Civil Procedure.

The public policy objective to enhance the professionalism and integrity of police officers who have a very difficult job in our society is not assailed. However, to that end, prosecutors should not be actively involved in either giving advice or in investigating criminal activity. Those actions are best left to other legal advisors. If the prosecutor desires supplemental or independent investigation, he can no doubt have officers assigned to work with him. This is generally contemplated in a grand jury proceeding in which witnesses are subpoenaed to appear and testify. To some extent it is inevitable that a prosecutor would have to work closely with various police officers in order to know who to subpoena before a grand jury and what evidence exists to support probable cause. But Reed did not present his case to a grand jury or a judge. Giving permission to Cox to engage in improper, if not unconstitutional, conduct was a serious infringement of Burns' liberty interests. This action by Reed served no legitimate prosecutorial objective. It is comparable to the prosecutor giving permission for a warrantless search of a person's residence, knowing that any information obtained would be suppressed. Here again the Fourth Amendment seems to

recommend a clear line which would prescribe the limits of the prosecutor's function.

In defining "scope of authority," non-judicial actions should not be protected whether the conduct under scrutiny is that of a judge or a prosecutor. The Seventh Circuit incorrectly extended absolute immunity to judges in the case of *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986) with Judge Posner dissenting. Applying the functional analysis, this Court refused to extend absolute immunity to administrative or executive functions. *Forrester v. White*, 484 U.S. 219, 223-229 (1988). Included in the functional approach is an examination of the constitutional and statutory scheme. The Indiana Constitution governing Reed's conduct provides:

> **Prosecuting attorneys**.--There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall have been admitted to the practice of law in this State before his election, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. The election of prosecuting attorneys under this section shall be held at the time of holding the general election in the year 1974 and each four years thereafter. Indiana Constitution, Article 7 section 16 (as added November 3, 1970.)

There are no other references in the Indiana Constitution to the office of prosecuting attorney. The duties of the office are set out by the statute and again define the scope of Reed's authority.

Indiana Code 33-14-1-3 (1971) is set out verbatim in Pet. App. 23a. Other relevant provisions are:

Indiana Code 33-14-1-4 (1971):

> **Duties**.--Such prosecuting attorneys, within their respective jurisdictions, shall conduct all prosecutions for felonies, misdemeanors, or infractions and all suits on forfeited recognizances; and superintend, on behalf of counties or any of the trust funds, all

> suits in which the same may be interested or involved, and shall perform all other duties required by law.

Indiana Code 5-6-1-2 (1971):

> **Oath and duties.**--Such deputies shall take the oath required of their principals, and may perform all the official duties of such principals, being subject to the same regulations and penalties.

It would appear that public policy, if manifested in constitutional and statutory language, would put a prosecutor on notice as to the scope of his authority and possible penalties for exceeding the scope of his authority.

Reed's giving permission or authorization to Cox and Scroggins, Reed's decision regarding probable cause and arrest of Cathy Burns, and Reed's decision with Cox and Scroggins not to make known to the public the circumstances of Cathy Burns' alleged confession are not merely advice but are more properly characterized as investigatory activities *and* outside the scope of defined authority.

The Indiana Supreme Court has commented on that point:

> We first note that, although the office of Prosecuting Attorney is provided for in our Indiana Constitution, he receives his authority to act from the Legislature. Where the Legislature has enumerated the powers incident to any given office and the Constitution is silent as to the duties of that office, the Legislature's enactment is final, and supersedes any residual authority that office may have had at common law.

Mounts v. State, 496 N.E.2d 37 (Ind. 1986).

If Reed was acting outside the scope of his statutorily defined authority, then public policy should not endorse any conduct which is found to be unconstitutional or leads to constitutional deprivations. As mentioned in the concurring opinion in *Imbler*, the purpose of providing immunity to a judicial officer is to allow

him to freely act upon his own convictions without apprehension of personal consequences to himself and to remain independent. *Imbler*, 424 U.S. at 436. However, if his acts are not judicial, that is, not intimately associated with deciding to file criminal charges, then judicial independence is not at issue. Burns believes that public policy as discussed in *Imbler*, as set forth in the Fourth Amendment to the United States Constitution, and as discussed by several circuits would not excuse Reed's conduct and would not extend either absolute immunity or qualified immunity to protect him from both compensatory damages and punitive damages.

Imbler cautions that the threat of § 1983 suits would undermine the vigorous and fearless performance of a prosecutor's duties by deflecting his energies. The Court's fears might be unfounded. One commentator undertook an empirical study of 1983 actions and concluded that the volume of 1983 cases posed no serious threat to the court system. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 524 (1982).

The courts have voiced other public policy concerns. The public trust of the prosecutor's office would suffer if the decision-making was constrained by potential liability. But the contrary is more likely if the John Mitchells and Rick Reeds are perceived by the public as acting above the law, especially when there is no adversarial system to ensure the rights of a primary suspect.

The idea that acquitted criminal defendants would be bitter and translate this ordeal into animus for the prosecutor is another reason advanced for prosecutorial immunity. But this particular concern is inapplicable in the instant case as all of Reed's conduct was prior to formal filing of criminal charges. There is no defendant to prosecute. Cathy Burns was wrongfully arrested. There was no acquittal—her right to justice must surely go beyond dismissal of all criminal charges.

There are some activities that only prosecutors can perform: initiating a criminal case and trying it for the government. These activities occur in court. They are subject to judicial scrutiny and take place in an adversary context. These activities are protected by absolute immunity. But investigative activities that are undertaken by either or both prosecutors and police officers are not absolutely immune from civil challenges. Rather, when the prosecutor acts as part of the investigative team, that prosecutor like a police officer is entitled to qualified immunity.

This line which distinquishes such conduct is supported by the precedent of this Court. Subjecting investigative activities by prosecutors to qualified immunity does not seriously risk impairing the function of that office. As this Court stated in *Mitchell v. Forsyth*::

> We emphasize that the denial of aboslute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexations complaints. Under the standard of immunity in *Harlow v. Fitzgerald*, the Attorney General will be entitled to immunity so long as his actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of *Harlow*: 'Where an official could be expected to know that this conduct would violate statutory or constitutional rights, he should be made to hesitate.' 472 U.S. at 524 (emphasis in original) (citations omitted).

B. PROSECUTOR REED'S CONDUCT IS PROPERLY CHARACTERIZED AS INVESTIGATIVE.

1. REED'S ACTION IN GIVING ADVICE OR PERMISSION TO HYPNOTIZE, KNOWING IT WAS IMPROPER, SHOULD BE CHARACTERIZED AS INVESTIGATORY AND ACCORDINGLY IS NOT CONDUCT PROTECTED BY ABSOLUTE IMMUNITY OR QUALIFIED IMMUNITY.

The Seventh Circuit focused on the initial contact of Officers Cox and Scroggins with Deputy Prosecutor Reed when they sought "advice" on whether or not to proceed with the hypnotic interrogation of Cathy Burns. Such activity of the prosecutor is arguably both advisory and investigatory, and one characterization should not exclude the other, and neither is quasi-judicial.

While arriving at a definition in some ways is arbitrary, it nonetheless facilitates the discussion as long as the participants in the discussion agree on the fairness of the definition.

In the Burn's decision, the Seventh Circuit found support for its interpretation in *Imbler* in the Eighth Circuit, in the case of *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), which concluded:

> [I]n providing advice to law enforcement officials concerning the existence of probable cause and the prospective legality of arrest, Morris was functioning in a quasi-judicial capacity as a prosecutor initiating the formal judicial process.

810 F.2d at 1448.

In this holding Circuit Court Judge Frost cited the Seventh Circuit opinion of *Henderson, supra* to support his definitional conclusion, thus admitting to a mutual regard on this point. But the parties themselves, Cox and Scroggins, did not call Reed for "advice."

In his affidavit (Pleading No. 19) Cox states:

> 4. I talked with and obtained approval of chief deputy prosecuting attorney, Richard Reed, before hypnotizing Cathy Sells on September 21, 1982. (Emphasis added.)

Scroggins adds in his affidavit (Pleading No. 21):

> 3. I was present when Paul E. Cox conducted a hypnotic session with Cathy Sells (now Cathy Burns) on September 21, 1982. Both officer Cox and myself talked with and obtained the *approval* of chief deputy prosecuting attorney, Richard Reed, before hypnotizing Cathy Sells on September 21, 1982. (Emphasis added.)

This permission was necessary to excuse Cox's horrendous misuse of forensic hypnosis. Cox was instructed in his three-day seminar:

> PERSONS NOT TO BE HYPNOTIZED
> No suspect or potential suspect in any criminal matter will be considered for hypnosis sessions. (Pl. Exhibit 28).

Cathy Burns was helpless. With no one to protect her rights, Cathy was the primary target of their investigation and Reed was authorizing this unlawful intrusion into her privacy.

The use of forensic hypnosis is unequivocally investigative. Officer Scroggins relayed to Reed the serious reservations they had because of Cox's training (R. 37, 84, 101, 102).

The reservations are mirrored in professional journals and legal texts:

> Declarations made under hypnosis have been treated judicially in a manner similar to drug-induced statements. The hypnotized person is ultrasuggestible, and this manifestly endangers the reliability of his statements. The courts have recognized to some extent the usefulness of hypnosis, as an investigative technique and in diagnosis and therapy. However, they have rejected confessions induced thereby, statements made under hypnosis when offered by the subject in his own behalf, and opinion as to mental state based on hypnotic examination.

McCormick, Law of Evidence, § 208 at 510 (2nd ed. 1972) (footnotes omitted).

Numerous criminal cases and professional treatises warn of the misuse of forensic hypnosis. (See bibliography of cases and authorities attached to Pleading No. 9, Ex. D.)

Reed need not have become an investigator. The police were liable and paid a judgment for their wrongful conduct; no policy argument excuses Reed, and this advances the intended purpose of 42 U.S.C. § 1983. Cathy Burns urges this Court to hold Reed and those police officers to the same standard for the same wrongdoing.

2. REED'S DECISION TO APPROVE A WARRANTLESS ARREST WAS INVESTIGATORY.

Under Indiana Statutory Law, the prosecutor has the same arrest powers as a police officer (I.C. 35-33-1-1 and 35-41-1-17; Pet. App., 24a). Reed was as much a decision-maker to the arrest of Cathy Burns as Officers Cox and Scroggins. There were no exigent circumstances that would require an immediate,

warrantless arrest. Reed was gatekeeper to Burns' liberty. He was the one responsible, according to Officer Scroggins, as the ultimate decision-maker for detention (R. 107-08, 116). If the arrest is found to be unlawful or is in violation of the constitutional rights of Burns, Reed should suffer the same risks of liability as a police officer in similar circumstances under 42 U.S.C. § 1983.

The testimony of Cox and Scroggins indicated that after the hypnosis of Cathy Burns, there was a review of the videotape by Reed and at some point following that, a discussion on whether or not they had enough evidence to arrest her. Scroggins and Cox both indicated that they asked Reed what he thought and his reply could have been considered an opinion or could have been characterized as a joint decision to arrest. As already mentioned, Reed had the power to arrest under Indiana law.

Along with the power to arrest, he may be liable under state law for false arrest. Indiana's provision on the subject, commonly referred to as the Indiana Tort Claims Act, sets forth the governmental limits of liability at I.C. 34-4-16.5-3, which reads in pertinent part as follows:

> **Immunity from liability.**—A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from:
>
> * * *
>
> (7)The adoption and enforcement of or failure to adopt or enforce a law . . . , *unless the act of enforcement constitutes false arrest or false imprisonment*. (Emphasis added.)

In this particular case, Cox, Scroggins and Reed chose to effect a warrantless arrest without the benefit of an impartial magistrate to weigh objectively the evidence that might support probable cause. It is just such abuses which are prohibited by the Fourth Amendment and which do not comport with the limiting protections enunciated in *Imbler*. The Fourth Circuit, for example, has held unequivocally that making an arrest is a police function, not a judicial one, *Weathers v. Ebert*, 505 F.2d 514, 517 (4th Cir. 1974) *cert. denied*, 424 U.S. 975, 96 S.Ct. 1480 (1976).

Whether or not an arrest is effected and by whom may be a question for the jury: "An arrest is the taking of a person into custody so that he may be held to answer for a crime." I.C. 35-33-1-5 and *King vs. City of Fort Wayne*, 590 F.Supp. 411 (N.D. Ind. 1984). An arrest is made by actual restraint of the person or by his submission to the custody of the officer. See I.C. 35-33-1-1. An officer does not necessarily need to tell the accused that he or she is under arrest when the circumstances make it clear that the officers are intending to arrest the accused and an announcement of such would be idle ceremony. See *Pullins v. State*, 253 Ind. 644, 256 N.E.2d 553 (1970). Burns would reiterate that Reed was critically involved in the joint decision and the arrest of Cathy Burns. The arrest would not have been made were it not for Reed's giving permission (R. 116). There were not exigent circumstances. The failure of Reed the following day to inform the court as to the circumstances which allowed the police officers to interpret Burns' testimony under hypnosis as a confession, suggest that Reed willfully acted to subvert the Fourth Amendment provisions which would have protected Cathy Burns from a false arrest. This conduct should not be protected by either absolute immunity or qualified immunity.

3. REED'S PRESENTING FALSE AND DECEPTIVE INFORMATION AT A PROBABLE CAUSE HEARING IN WHICH HE SOUGHT A SEARCH WARRANT WAS INVESTIGATIVE.

Burns respectfully directs the Court to read carefully the transcript of the testimony between Prosecutor Reed and Officer Scroggins which is found in the Appendix to the Petition For Writ of Certiorari. This type of fraud on a court should never be protected by absolute immunity when it precedes the filing of formal criminal charges. In the case of *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974), the Court of Appeals denied absolute immunity to a prosecutor who had assisted in obtaining a search warrant based upon perjured testimony. In the instant case, it was Reed who actually testified, eliciting from Scroggins only confirmation of information which rather specifically alluded to the interrogation under hypnosis the previous day. It was not an oversight, as Reed contends, that he forgot to mention it to the judge; Cathy Burns would prefer to argue that point to the jury and allow the jury to decide the question.

The seeking of a search warrant before formal charges are filed under false pretenses has to be viewed as investigative. The Seventh Circuit's reliance on *Imbler* is misplaced and its summary r[illegible]ion of petitioner's argument in a footnote hardly seems consiste[illegible] with the common law and historical policy considerations [illegible]scussed at length in *Imbler* and many other circuit cases.

This lack of evidence may be one explanation why Reed chose not to file formal criminal charges, contrary to state law, until eight days after the warrantless arrest. Here again, in the affidavit there was no mention of the fact that the information elicited from Cathy Burns, which the officers interpreted as a confession, was obtained exclusively under hypnosis.

Burns would urge the Court to reject any arguments which would allow this conduct to fall within the pale of absolute immunity as prescribed in *Imbler*. This also seems consistent with the Fifth Circuit's holding in *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) *cert. denied*, 450 U.S. 913 (1981):

> [A] prosecutor who assists, directs or otherwise participates with the police in obtaining evidence prior to indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacity . . .

625 F.2d at 505. The dishonest conduct of Reed and Scroggins deserves equal application under 42 U.S.C. § 1983.

C. DISCIPLINARY ACTION AND CRIMINAL PROSECUTION FOR PROSECUTORIAL MISCONDUCT ARE NONEXISTENT AS AN ALTERNATIVE CHECK ON REED'S ACTIONS.

Cathy Burns sought simultaneously redress from the Indiana Disciplinary Commission for the deceitful actions of Reed on obtaining a search warrant while her civil case was pending. It was summarily rejected without investigation. This single episode would prove nothing but for the fact that since 1975, there are no reported cases of prosecutorial discipline or criminal prosecution for perjury or related misconduct.[12]

This is consistent with available reports on the subject matter.

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[12]There are cases of prosecutors being charged for fraud or theft.

> Another sanction that could be employed and would be entirely personal to the prosecutor is disciplinary action through a bar association committee. Such sanction has been invoked, but its imposition is so rare as to make its use virtually a nullity . . . . With the exception of a handful of cases . . .effective disciplinary action is an illusion. [Footnotes omitted.]

Bennett L. Gershman, Prosecutorial Misconduct, § 1.8(d) 1989.

Imbler asserted that absolute immunity would not leave the public powerless to deter and punish misconduct. 424 U.S. 409, 428-429. The Court pointed to the criminal law, citing 18 U.S.C. Section 242 and Cal. Penal Code Section 217 (1970), and to professional discipline as adequate checks on prosecutorial abuse. *Butz*, too, made reference to the professional obligations of advocates. 438 U.S. 478, 512. But the idea that EC 7-13 or the ABA Standards are effective deterrents to overzealous conduct is simply not supported by the evidence.

Cal. Penal Code Section 127 makes anyone guilty of the subornation of perjury punishable as if he were personally guilty of perjury. It does not deal directly with attorneys, and a review of California cases failed to turn up a single instance of this statute's use against a prosecutor. The case cited in *Imbler*, p. 29, *In re Branch*, involved a state-appointed defense attorney and not a prosecutor (and he was found innocent). Research of cases under 18 U.S.C. § 242 failed to identify any case involving a prosecutor. *Imbler's* reliance on the criminal law as a deterrent to prosecutorial misconduct seems misplaced.

Two commentators have described the problem in the title of their published article. See Edward M. Genson and Marc W. Martin, *The Epidemic Of Prosecutorial Courtroom Misconduct In Illinois: Is It Time To Start Prosecuting The Prosecutor?* 19 Loyola University Law Journal 39, 57.

Evidence of professional disciplinary actions for prosecutors does not recommend this sanction as a deterrent. Some jurisdictions have even expressed doubt about the applicability of the ABA Code of Professional Responsibility to prosecutors. Alabama and Pennsylvania have refused to let the bar impose professional discipline on prosecutors. *Simpson v. Alabama*, 311 So. 2d 307 (Ala. 1975); *Snyder's Case*, 301 Pa. 276 (1980). This

stands in marked contrast to the *Imbler* court's assertion that prosecutors stand unique in their amenability to professional discipline. Furthermore, a survey of appellate cases dealing with all types of prosecutorial misconduct shows that a sizeable number, perhaps a majority, related to a prosecutor's nonadvocate functions. Steele, *Unethical Prosecutors And Inadequate Discipline*, 38 Southwestern Law Journal 965, 970. See Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 A.L.R. 4th 605 (1981).

The evidence says that advocacy-related misconduct is going unpunished to an even larger degree—and yet this is precisely the kind of activity to which the court has extended absolute immunity, at least in part on the basis of the possibility of professional discipline. See Steele and Alschuler, *Courtroom Misconduct by Prosecutors and Trial* . . . 50 Texas L. Rev. 629 (1972). Reed's conduct was investigative; there is no advocacy nor is discipline likely.

II.

JURIES SHOULD BE THE FINAL ARBITERS OF QUESTIONS OF FACT WHEN PROSECUTORIAL CONDUCT AND THE INTEGRITY AND VERACITY OF WITNESSES DO NOT DEFINE THE ISSUE OF IMMUNITY PURELY AS A MATTER OF LAW

The Supreme Court has consistently found support in the common law and in its contemporary fashioning of public policy to clothe prosecutors with absolute immunity for conduct which is intimately associated with the bringing of criminal charges and presenting the State's case. But the nuances of motive, the plausibility or justification of the acts, and the demeanor of witnesses cannot be conveyed in briefs opposing motions to dismiss or summary judgments. Only a jury viewing the witnesses or the parties can apply common sense in partnership with common law instructions. Without a bright line test to guide the court in its pre-trial motion rulings, the question of involvement in police investigatory actions is best left to the jury. Immunity was not intended to allow wrong-doers to escape their deeds.

Alexis de Tocqueville spent approximately nine months in the United States in 1831 and 1832, and yet wrote extensively

about his impressions of democracy and the evolving experiment which attempted to control the tyranny of the majority and yet allow freedom for individuals. His commentary on the American jury system is worth reading again. It is an institution for public policy.

> *** The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.
>
> ***
>
> The institution of the jury consequently invests the people, or that class of citizens, with the direction of society *** The jury cannot fail to exercise a powerful influence upon the national character *** The jury *** serves to communicate the spirit of the judges to the minds of all the citizens; and the spirit, with the habits which attend it, is the soundest preparation for free institutions. ***[13]

These sentiments, although the observation of a European, express the ideals of the nineteenth century as well as the twentieth century. The judgment of one's peers, who take into account their everyday experiences and understandings of human nature, and who speak the public interest by their verdict was removed by the trial court and taken away from Cathy Burns.

To illustrate the difficulty of forcing these issues into a strictly legal mold, compare the initial opinion of the trial court based upon the depositions, affidavits and other evidence. The court wrote in its entry dated May 1, 1987:

> 'When determining which type of immunity a government official enjoys, we look to the nature of the function that the official was performing in the particular case.' *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986). Because Defendant Reed could not recall vital incidents of the investigation, specifically recalled by officers Cox and Scroggins, material issues of fact remain as to Reeds possible investigative activities herein *** In the alternative Defendant Reed claims the defense of qualified immunity. Reed is not entitled to qualified immunity because of his activities with Defendants Cox and Scroggins in regards to the probable cause hearings.[14]

Burns maintains that the record made during the trial was even stronger than the allegations in the complaint. What was left, of course, was for Reed to attempt to explain his conduct, qualify his actions and excuse his participation in what would otherwise be viewed as investigatory conduct. These subtle nuances should have been decided upon and weighed by a jury as opposed to a judge. Burns is at a loss to find what it was that the judge saw in the testimony or heard from the witnesses, which under *Mitchell v. Forsyth*, was so clearly a legal question as to preclude the jury when he initially thought it was a fact question.

Other appellate courts have had the same dilemma. In the case of *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988) the court stated:

> We do not agree that applying to the Court for a wiretap warrant is clearly a prosecutorial function. Further factual inquiry is necessary to determine whether the functions Arcara and Quinlan performed entitled them to absolute immunity. Even if they are not entitled to absolute immunity, they may be entitled to qualified immunity if their actions were objectively reasonable under clearly established law. (Citations omitted).

850 F.2d at 77.

The Court went on to add that based upon the allegations in the complaint the parties were not entitled to absolute immunity,

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[13] See Democracy In America, Alexis de Tocqueville, Richard D. Heffner, The New American Library, 1956, p. 127-128.

[14] Found in the record as Pleading No. 40a.

nor was their conduct objectively reasonable under clearly established law entitling them to qualified immunity.

The First Circuit, in the case of *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974), denied absolute immunity to a prosecutor who had assisted in obtaining a search warrant based upon perjured testimony. In the case of *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), the Ninth Circuit reversed the Trial Court's motion to dismiss and stated:

> Given the limited factual record at this point in the proceedings it does not appear beyond doubt that the plaintiffs will be unable to prove that the prosecutors were engaging in police-type investigative work.

867 F.2d at 1204.

Here again the court required further development of the facts which would support the contentions of the plaintiffs Gobel and DeFranco. In the view of Burns, prosecutors can simply put forth any self-serving statement to justify or explain how their actions aided them in determining whether or not to initiate formal criminal charges. It must be reiterated that there is no prohibition against prosecutors doing any of these things. It is only when the plaintiff makes out a prima facie case that the arrest or search was unlawful under the Fourth, Fifth or Fourteenth Amendments, does the question of scrutinizing the prosecutor's conduct become significant.

The Seventh Circuit seems tentative about whether juries should be responsible:

> [1]Who decides the immunity question when facts pertinent to it are in dispute--judge or jury? See *McGaugher v. City of Chicago*, 664 F.Supp. 1131, 1139 (N.D.Ill.1987). The cases in this circuit go both ways, but our most recent and only en banc decision on the question states that the judge should always decide the issue of immunity. See *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988). That is what was done here, without objection by either party.

Jones v. City of Chicago, 850 F.2d 985 (7th Cir. 1988).

In the instant case, the jury had heard testimony supporting a series of separate investigative activities of Prosecutor Reed. They further viewed word for word the testimony of the Hearing For Probable Cause. Burns can find no persuasive public policy reason or legal argument to take such a decision away from the jury when the witnesses' veracity is already in question.

The Sixth Circuit, in the case of *Joseph v. Patterson*, was asked to determine whether or not the defendant's alleged interrogation of a witness is insulated activity under *Imbler* and subject to dismissal under *Mithcell, supra*. The court stated:

> Because there are allegations which could support a finding that Thompson acted in an investigative capacity during the interview, we conclude that summary disposition was inappropriate. Remand is necessary for further development of the record on this issue before the District Court can properly determine the nature and intent of the interview and whether absolute immunity should insulate Thompson from liability for this alleged act.

795 F.2d at 555.

This further example of determining a prosecutor's motive or intent is a very subjective one best left to a jury to view the witness and weigh his testimony in reaching a final determination of liability.

Burns is particularly persuaded by the reasoning of the Fifth Circuit in the *Marrero* case, which was handed down after *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978) and *Owen v. City of Independence*, 438 U.S. 902 (1980). The Court outlined its principles in deciding the issues, and those principles give considerable deference to the jury process:

> Since § 1983 by its very terms admits of no immunities, but rather imposes liability upon "every person" who, under color of state law, deprives another of his civil rights, courts are naturally loath to clothe any person with an immunity which would frustrate the statutes' design of providing

> vindication to those wronged by the misuse of state power *** Hence, immunities are extended to government officials only when "overriding consideration of public policy nonetheless [d]emand that the official be given a measure of protection from personal liability and "to ensure his ability to function effectively" *** Moreover, even when a measure of protection is given to an official, the policy in favor of protecting the individual's right to compensation normally mandates that qualified immunity be granted *** Thus, only in "exceptional situations" do the special functions of an official require the protection of an absolute shield from liability. (Citations omitted)

Marrero, 625 F.2d at 503.

Thus Burns argues that the trial court erred in granting defendant's motion for a directed verdict and interfered with the proper constitutional function of the jury. On appeal, the Seventh Circuit was obliged to review the record and ruling of the trial court based upon the same principles of Rule 51 of the Federal Rules of Civil Procedure. See *Appleman v. United States*, 338 F.2d 729 (7th Cir. 1964), *cert. denied*, 380 U.S. 956 (1964). If there are questions of fact, as Burns maintains, then all reasonable inferences must be allowed to the non-moving party and the evidence must be viewed in the light most favorable to the party opposing the motion. These standards, when applied to the record established in the trial of *Burns v. Reed*, even in light of the functional approach set forth in *Imbler*, recommend that this matter should have been sent to the jury. See *Kole v. Chrysler Corp.*, 661 F.2d 1137, 1140 (7th Cir. 1981).

Burns found further support for her argument in the case of *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979). In this case the Seventh Circuit was asked to review the trial court's decision granting a directed verdict to the defendants. The court opinioned:

> [A] motion for directed verdict must be denied when the evidence reveals that reasonable persons 'in a fair and impartial

> exercise of their judgment may draw a different conclusion therefrom'.

600 F.2d at 607-08.

Almost all of the cases cited in Burns' brief which accuse prosecutors of extra-judicial conduct involve more than one act which allegedly falls outside the protection of absolute immunity. It is those successive acts which give credence and weight to Burns' argument that the prosecutor was not acting judicially but rather as a police officer. He involved himself by coming down to the detective's headquarters after working hours and viewing the videotape of Burns' hypnosis, conferring with the officers about whether or not there was probable cause and whether they should arrest her, conferring about where she should be held pending the filing of formal charges, conferring about whether or not to make public the circumstances which led to the "solving of the crime." Each of these acts taken alone may be more difficult to defend as an investigatory action on the part of Reed. Taken collectively, this particular sequence demonstrates a continuing involvement in police investigative function, including participation in obtaining a search warrant under false pretenses. Burns can only speculate on the motives, but it is quite possible that the police and Reed felt that she would confess under the post-hypnotic suggestion or from the public pressure, and they probably hoped there would be some incriminating evidence directly linking her to the crime. But none of that happened. She did not confess, she maintained her innocence, and they continued to misrepresent to the court in seeking a warrant for her arrest by failing to mention that she had denied any responsibility before the hypnosis and continued to deny any responsibility after the hypnosis. The affidavit in support of her arrest was not offered into evidence to demonstrate a separate theory of liability against Reed and Stonebraker, but rather to demonstrate a continuity of duplicity in the wrongful arrest of Burns and the consequential taking of her children by civil court authorities.

The functional analysis by the trial court in ruling upon the motion for a directed verdict removed the issue from the jury because of its definition of Reed's conduct. While definition is necessary to control the scope of the argument, if the definition is made by such broad strokes of language that the result is confusion then the deduction is based on a false premise. Here, too, in *Burns*, the overly broad definition of "advice" came to

include giving permission to hypnotize, joining in a mutual decision to arrest, a collective decision to keep the hypnosis from public knowledge, and seeking a search warrant, all this conduct prior to filing criminal charges. If all of these activities had occurred among police officers, there is no doubt that these pre-trial activities would be regarded as investigative.

The First Amendment right to petition government for redress which includes access to the courts, supports as well, Burns' arguments against absolute immunity: the citizen has the right to petition the court; yet if the court preemptorily dismisses such claims for reason of prosecutorial immunity, such a right of redress is, in effect, voided by a foregone conclusion.

Burns believes that reasonable persons could differ as to the nature, characterization of the activities in which Reed was engaged, and it should have been left to the jury to decide these subjective issues. Burns believes that had the jury been allowed to deliberate, weigh the evidence and hear arguments of counsel, that Burns' rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution would have resonated to those ideals of justice and fairness and the remedies of 42 U.S.C. § 1983.

CONCLUSION

For all of these reasons, the Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Seventh Circuit and the decision of the District Court and hold that the actions of Rick Reed are not protected by absolute immunity and that the District Court erred by granting Respondent's motion for a directed verdict.

Respectfully submitted,

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August 1990